The original order of the Supreme Court is printed in Appendix D, *infra* page 19, and the formal opinion, by that Court, rendered in support thereof is officially reported as *State v. Arrington*, 2 Ohio St. 2d 172 (March 19, 1965). This opinion is printed herein in Appendix E, *infra* page 19.

The opinion of the Supreme Court of Ohio, on Petitioner's Motion for Reconsideration, is officially reported as *State vs. Arrington*, 3 Ohio St. 2d 61 (July 7, 1965), and is printed herein as Appendix F, *infra* page 20.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Supreme Court of Ohio became final on the 7th of July, 1965. And this Court, by an appropriate entry (See Appendix G, *infra* page 24), extended the time within which this Petitioner could file a Petition for Certiorari until December 4, 1965.

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1257 (3), since the certain rights, privileges and immunities guaranteed the Petitioner by the federal constitution are claimed to have been violated.

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

I.

During the trial of Petitioner certain members of the Cleveland Police Department were allowed to testify, over objection, as to the details of their interrogation of Petitioner (after indictment) and were permitted to give evidence as to an "alleged" confession and other damaging admissions. An appropriate motion was made by trial counsel to strike:

* * * All of the testimony by Lieutenant White, in reference to an alleged confession by Arrington be stricken from the record; and * * * that any and all testimony of Chief Wagner in reference to an alleged confession or statements by Arrington be stricken from the record.

The defense feels that these statements as taken, and these alleged admissions as related by these officers, if allowed in, would be a deprivation of due process under the Fourteenth Amendment. I feel there can be no quarrel that the defendant was under indictment (R. 703). (In support of this thesis trial counsel cited *People v. Waterman*, 9 N. Y. 2d 561 and *People v. Di Biasi*, 7 N. Y. 2d 544.)

II.

Further the Court after determining that the objections to the above referred to testimony "puts the Court on Notice that the Court should conduct an examination into the voluntariness of this out of the presence of the jury * * *" (R. 758), the Court after hearing one witness, the Cuyahoga County Prosecutor (who likewise testified that Petitioner confessed during these conferences had after indictment), ruled that "the burden of proving that a confession is involuntary is upon the defendant" (R. 779), that in his judgment the "prosecutor advised him [Petitioner] of his rights, including his rights to have counsel present, his right to make a statement if he so desired" (R. 780), that the Petitioner in fact "waived" his rights (R. 783), and that the confessions were admissible (R. 784). Further, it was stated that the "Court is not ruling upon the propriety of the act of the County Prosecutor (that is, in questioning a person under indictment without the presence or knowledge of his retained counsel)" (R. 784).

The issues involved in the admission of these con-

fessions were the subject of two distinct opinions by the Supreme Court of Ohio, and it cannot be denied that a resolution of these constitutional issues was essential to the determination by that Court.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the introducion of an "alleged" confession obtained from an accused after indictment, who was questioned for numerous hours without the knowledge and presence of his retained counsel, is a violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II.

Whether the introduction of an "alleged" confession obtained in violation of Canon 9, of *The Canons of Legal Ethics of the American Bar Association,* is violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

III.

Whether or not the police and prosecutor's questioning an indicted defendant, in the absence of his counsel, should turn on the narrow question as to whether or not the inquisitors were able to convince the trial court, in spite of a denial, that (a) the interviews were sought by the defendant and (b) counsel was waived.

CONSTITUTIONAL, STATUTORY AND ETHICAL PROVISIONS INVOLVED.

The pertinent portions of the United States Constitution are set out below:

> *Amendment V*—"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."
>
> *Amendment VI*—"In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel in his defense."
>
> *Amendment XIV*—"* * * Nor shall any state deprive any person of life, liberty or property without due process of law * * *."

Canon 9, *The Canons of Legal Ethics of the American Bar Association,* provides:

> "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

STATEMENT OF CASE.

Petitioner was indicted, tried, convicted, and sentenced to life in the Ohio Penitentiary for malicious entry of a financial institution with intent to commit a felony, for burglary of a bank, for attempting to force entrance into a bank vault, and for unlawful possession of burglar tools.

At his trial, the case against him was purely circumstantial. And the issues generated thereby were so close that a considerable portion of the record of the trial

involves prosecution testimony concerning an alleged confession the petitioner supposedly made to the Cuyahoga County Prosecutor, the Chief of the Cleveland Ohio Police Department and a Police Lieutenant. The Petitioner denied that he made any such confession (R. 946-951; 954-957; 959-960). Further, the Petitioner denied as was testified by the above persons that he sent for them, and further denied that he waived his right to counsel.

Significant here, as is apparent by the selected segments of the trial record (quoted below), each of the various interrogators knew Petitioner was represented by Counsel.

From the cross examination of Lieutenant White:

"Q. You knew I represented Mr. Arrington, didn't you, Lieutenant, at this meeting with the County Prosecutor?

A. Yes, sir.

Q. Think it was a little unusual that I wasn't there? Yes or no, please.

A. No.

Q. Did you discuss with Mr. Corrigan whether or not Jerry Milano should have been down there?

A. No.

Q. Where is my office, Lieutenant?

A. In the Payne Building, here on 21st Street, the Film Building." (R. 618.)

From the testimony of Richard Wagner, Chief of the Cleveland Police Department:

"Q. All right, did you feel that Mr. Arrington was represented by myself?

A. Did I feel he was represented by you?

Q. Yes, I knew he was represented by you (R. 764).

* * *

Q. And you have at no time, sir, advised me as to his appointments with you, either before they were made or after they were made, have you, sir?

A. I don't believe that I have. (R. 765.)

* * *

Q. And didn't you have a duty to afford him that you call his attorney down? Didn't you feel that you had that duty?

A. No, sir." (R. 822.)

In determining that this confession was admissible the Trial Judge stated:

"The second part of your motion to strike the confession is that it is inadmissible because it is involuntary, and the involuntariness of the confession is brought about by the fact that it has been induced by a promise by the County Prosecutor in this case.

Taking them in reverse order for the purpose of logically one following the other in the opinion we must make this assumption of law:

First of all, that the burden of proving that a confession is involuntary is upon the defendant, and the voluntariness of each confession in each case must be viewed and determined by the Court by all of the surrounding circumstances under which the confession was given. And the Court is going to take the position that this confession was voluntary, taking into account all of circumstances surrounding the giving of this confession. The defendant was the one that initiated the request for the interview. The Prosecutor advised him as to his rights, including his rights to have counsel present, his right not to make a statement if he so desired. And counsel made some reference to the fact that whose word are you going to take?

We have at this point, at least, the word of the Prosecutor, that this advice was given to him. The Court is not prepared at this point to say whether

the words that the Prosecutor said to the defendant was a promise. If giving it its—giving the defendant every benefit of the meaning of the words, if it was a promise, that promise certainly did not induce the confession, and any confession that was given, as far as this Court can see, was not given as a result of that promise, if we do, just for the sake of this argument and for the sake of the motion, assume that it was a promise. The Court is not prepared to go that far. (R. 779-780.)

* * *

There has been no evidence produced on the part of the defendant that he was not—that this waiver was not given intelligently, understandingly and in a competent manner, or that it was not voluntary, it was without outside pressure or coercion. From what the Court has heard so far, it appears that the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least, the little that the Court has been able to surmise from the evidence so far that he is no stranger to a courtroom. As to whether it was voluntary and he acted without coercion, I think that is disposed of by the fact that he initiated that meeting, that he was told of his rights and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it.

So that, obviously, the Court, as you can assume from the remarks I have made so far, is going to overrule the motion on the ground of the violation of his Constitutional rights under due process clause and under Article 1, Section 10 and Section 16 of the Ohio Constitution. As I have said, it is to be determined by several of the surrounding circumstances:

This, too, as well as the voluntariness of the confession. This Court does not say that under the same circumstances, if this defendant were called down to be interrogated, that the ruling would be the same. *This Court is not ruling upon the propriety of the act*

of the County Prosecutor, but the Court is ruling strictly upon the law and the admissibility of this confession at this time under the law." (R. 783-784.) (Emphasis supplied.)

ARGUMENT RELIED ON FOR ALLOWANCE OF THE WRIT.

It can not be denied that the right to counsel guaranteed an accused by the Sixth Amendment is violated when a confession is obtained by questioning a person under indictment without the presence of his counsel. *Massiah v. United States,* 377 U. S. 201 (1964); *Spano v. New York,* 360 U. S. 315 (1959). And such statements have been held to be inadmissible without regard to their voluntariness or truthfulness. See, *People v. Donovan,* 13 N. Y. 2d 148 (1963); *People v. Meyer,* 11 N. Y. 2d 162 (1962) and *People v. Di Biasi,* 7 N. Y. 2d 544 (1960). Cf., *People v. Waterman,* 9 N. Y. 2d 561 (1961).

Also, it can not be cogently denied that today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions. *Malloy v. Hogan,* 378 U. S. 1 (1964). Nor can it be seriously doubted that had the Petitioner been taken after indictment before a court or grand jury, without the knowledge and advice of his counsel, such procedure would be deemed indefensible.[1] Yet, the procedure resorted to here by the prosecution is not sufficiently distin-

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[1] In *Powell v. United States,* 226 F. 2d 269, at 274 (D. C. Cir. 1955) it was recognized that: "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from critical observation of the public. But there is a serious question whether our procedure fortified by the Constitution permits that procedure."

guishable to require a different result. In fact, the facts here depict a more aggravated situation, one subject to an even greater abuse for such statements were not reduced to writing.

More specifically, in this cause, Petitioner had been indicted and had retained counsel. These facts were known to the County Prosecutor (R. 760), who, further, blandly asserted that he felt no obligation to inform Petitioner's Counsel of these interviews (R. 820-822) and that his duty in this case was merely to advise such person of his rights —which he says he did. Although Petitioner denied that he sought the interview (R. 945) and denied (R. 955) that he confessed.[2] These issues which were resolved against him by the Trial Court (R. 779-784) and the Supreme Court of Ohio are not, in our judgment, determinative of the issue sought to be resolved.

In essence, it is the contention herein being made that this Court ought in an appropriate opinion declare that *any interrogation of a person under indictment without the knowledge or presence of counsel can not be squared with due process.* Further, it is contended that no accused person ought to be placed in the predicament, that Petitioner was placed in, of being interrogated in secret

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[2] If nothing else, appropriate here is what was said by one Court—that is,

> "Even if not fully worth his salt, we may be sure that * * * [any lawyer] would have insisted that any admission would have to be in the form of a written statement, signed and approved by the accused or a record of some kind made and attested to by a court reporter. There would be some kind of assurance of accuracy of the agent's recital of what * * * [was] reputedly admitted. See *Wong Sun v. United States* * * * Here we have a narrative of oral conclusory statements, the accuracy of which is dependent upon the memory and conscience of the inquisitor." *Lee v. United States,* 322 F. 2d 770, at 777 (5th Cir. 1963). Also see Judge Fahy's dissent in *Jackson v. United States,* 337 F. 2d at 144, *Cert. denied,* 380 U. S. 935 (1965).

by persons who later testified from memory that such person confessed. Necessarily this limits the issue for the jury to the simple question: Who are you going to believe—the County Prosecutor, the Chief of Police and one of his Lieutenants or the ex-convict defendant?

At least this much seems clear, when indictment has been returned the lines are pretty well drawn. So much so that such an interrogation as was had here ought never have happened.

In *Massiah v. United States, supra* at 205, this Court emphatically recognized the New York rule, developed in the wake of *Spano v. New York* (360 U. S. 315), that:

> " 'Any secret interrogation of the defendant, from and after the finding of the indictment without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' *People v. Waterman,* 9 N. Y. 2d 561, 565 [1961]."

And, in commenting on their rule, the New York Court of Appeals has stated:

> "It is the interrogation in the absence of counsel, after the criminal proceeding has been commenced, whether by Grand Jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden. The procedure followed by the law enforcement officers [in questioning such an accused] not only violated * * * [his] right to counsel * * * but also infringed upon his privilege against self incrimination." (*People v. Rodriguez,* 11 N. Y. 2d 279 [1962].)

Further, in the opinion written for this Court in *Massiah,* it was said (377 U. S. at 205) and in cogent language, that "[t]his view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama,*

287 U. S. 45 * * *." Moreover, and in line with this premise this Court ruled:

> "We hold that the Petitioner was denied the basic prosecutions of that guarantee when there was used against him and his trial evidence of his own incriminating words which federal agents elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States,* 377 U. S. 201 at 206.

Contrary to the precedents articulated in *Spano* and *Massiah,* the Ohio Supreme Court in this case assertedly would resolve the Fifth and Sixth Amendment rights involved in interrogations of *indicted* persons on the basis of the credibility of the respective parties to the procurement of such confessions and admissions. Viewed in such posture it is a virtual certainty that as between an unsavory defendant—on the one hand, and elected public officials and ranking police officers—the choice of a jury is almost automatic.

Any Statement Secured From an Accused Without Notifying His Counsel of the Interrogation Is Inadmissible.

I.

At first blush, the above contention appears to be an innovation, and if it is, then of course it ought to be. This is so despite the fact that its adoption might—to advance the arguments of others—further hamstring the police and the prosecution. In any event, the fact remains, when such statements are suppressed we are not taking away from the prosecution anything to which they are rightly entitled.

In this regard it has been held that there was a violation of the right to counsel where an accused was taken

before a Grand Jury without informing his counsel. See, *Short v. United States* (No. 17,689) ____ U. S. App. D. C. ____ (Feb. 6, 1964). Aff'd on another ground in *Jones and Short v. United States,* 342 F. 2d 863 (D. C. Cir., *en banc* 1964).

We contend on the basis of this Court's previous holdings that the theory advanced in *Short, supra,* ought to be crystallized into a rule prohibiting all interrogations of formally accused persons without the presence or knowledge of counsel. Any other rule would, and does, unnecessarily expose an accused person to the danger that the issue of guilt or innocence would turn on the narrow, unnecessary and artificial question as to whose version of an unrecorded conversation is the jury going to believe.

II.

As was said in *People v. Waterman, supra,* "The initiation of a criminal action against the accused by the finding of an indictment operates to impose certain disabilities upon the people" (9 N. Y. 2d 561, at 566). Also see *Spano v. New York, supra* (Stewart, *J.*, concurring), 360 U. S. at 327. If this is so, and we submit that it is, then surely the prosecution is at least required to inform retained counsel that his client will be interviewed. This rule ought obtain, even where it is a fact that the arrestee is the one who seeks the interview.

In this cause, Counsel for Respondent (see Brief of Appellee in the Ohio Supreme Court, at pages 20-21) would distinguish this case from *Massiah* on the same basis that the Ohio Supreme Court sought to distinguish *Massiah* in *State v. McLeod,* 1 Ohio St. 2d 60 (1964). *State v. McLeod,* of course, was subsequently reversed by this Court in *McLeod v. Ohio,* 381 U. S. 356 (1965), on the

basis of *Massiah*. Yet, and despite their clear declaration that *McLeod* was controlling, the Ohio Supreme Court upon reconsideration took the strange position that:

> "The facts in the instant case [i.e., petitioner's case] bear no resemblance to either *McLeod* or *Massiah*." (*State v. Arrington*, 3 Ohio St. 2d at 61.)

In the above regard, it is submitted that the Ohio Supreme Court was wrong in both of its opinions, that this Court's opinion in *Massiah* is indeed controlling. And, like in *McLeod*, this Court ought render the same judgment.

III.

It is of interest, in this cause, to note that in *Massiah* some of the members of this Court—after recognizing that the American Bar Association's *Canons* are not of "Constitutional dimensions"—subscribed to the view that:

> "Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant * * *." *Massiah v. United States*, 377 U. S. at 210-211 (White, *J.*, dissenting).

We submit that counsel for the State was at least required to have informed Petitioner's Counsel of his intention to question him. If nothing else, Petitioner was entitled to the advice that if he participated in such interviews, as was testified to, his interest would be better protected if the interviews were recorded.

Surely if this were a civil case, the action of the State's Counsel, in contravention of Canon 9, would be a matter of grave concern. It should be less a matter of similar concern where more than property is involved.

"Under the Circumstances Here Presented, the Prosecution's Use at the Trial of Evidence of the Petitioner's Own Incriminating Statements Deprived Him of * * * Right[s] Secured to Him Under the Federal Constitution." [3]

The Petitioner was said to have waived his right to counsel in face of the explanation given him by the Prosecutor, who gave direction to the interrogation. And by "Waiver" it is supposed that the trial court determined that there was an "intentional relinquishment or abandonment of a known right or privilege" (*Johnson v. Zerbst*, 304 U. S. 458, 464).

Aside from the fact that Petitioner denied making the confessions and admissions attributed to him, and aside from the fact that he was not unfamiliar with some aspects of a criminal prosecution, the fact that he had retained counsel absolutely imposed on the prosecution the duty to respect resulting relationship of attorney and client. But that is not all; the formulation of this relationship was such that it not only imposed on the defense counsel the obligation of advising his client as to his rights, it further eliminated all other attorneys—especially opposing counsel—from any necessity to advise him.[4] Surely, it is just as much a breach of the rules of fair play for the Prosecution's counsel in a criminal case to interview the defendant behind his counsel's back, as it would be for an insurance counsel to secretly interview an injury victim.

With these thoughts in mind, it is urged that this case be deemed an appropriate one for the declaration that counsel for the prosecution can not, consistent with the

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[3] *Massiah v. United States*, 377 U. S. at 202.

[4] By failing to inform Arrington's Counsel of the impending interview the prosecutor deprived him of the assistance of counsel at a crucial time and greatly to his prejudice—for counsel might have prevented him from making any statements.

requirements of due process, interview an *indicted* defendant without the knowledge of his retained counsel. And that there can be no effective waiver, based on the unilateral declarations of opposing counsel that he arrogated to himself the duty (that was not rightly his) of explaining to such person his rights.

CONCLUSION.

In this case we contend, and urge upon this Court to announce as a doctrine of fundamental due process the views, that:

1. Any secret interrogation of the defendant, from and after the finding of an indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

2. Counsel for the prosecution is prohibited by Canon 9 of the A.B.A.'s Canons of Ethics from questioning an accused represented by counsel, and more so where such accused has been indicted. And that the mandate of Canon 9 is consistent with the requirements of due process.

3. Any statements secured from an accused person, under either of the above circumstances, without having notified his counsel would be inadmissible.

WHEREFORE, and for the foregoing reasons, petitioner respectfully prays that a Writ of Certiorari be issued under seal of this Court directed to the Supreme Court of Ohio to the end that their judgment may be reviewed and reversed.

JAMES R. WILLIS,
Attorney for Petitioner.

APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO UPON REHEARING.

This cause was considered by the Court on the appellant's motion for rehearing which was treated as a motion for reconsideration and allowed. On consideration whereof, it is ordered by the Court that, for the reasons stated in the opinion rendered in this matter, its former judgment is adhered to.

APPENDIX B.

JUDGMENT ENTRY OF COMMON PLEAS COURT.

May 27, 1963:

To Court: This day came the Prosecuting Attorney on behalf of the State and defendant Joseph Arrington was brought into court; his counsel coming; also came the jury duly impaneled and sworn, and the trial proceeded.

And the said jury having heard all the testimony adduced, the arguments of counsel, and the charge of the Court, returned to their room for deliberation. And now come the jury, conducted into Court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Joseph Arrington guilty of violating R. C. 2907.141B as charged in the first count of the indictment. Further, we find Joseph Arrington guilty of burglary as charged in the second count of the indictment, and we further find defendant Joseph Arrington guilty of attempt to force entry into vault as charged in the third count of the indictment, we also find defendant Joseph Arrington

guilty of possession of burglar tools, as charged in the Fourth count of the indictment."

Thereupon, the Court inquired of the defendant if he had anything to say why judgment should not be pronounced against him and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the Court that defendant Joseph Arrington be imprisoned and confined in the Ohio State Penitentiary, Columbus, Ohio, for an indeterminate period, and that he pay the cost of this prosecution, for which execution is awarded.

It is further ordered by the Court that sentence on each count run concurrently. (Jr. 101, p. 375.)

HUGH A. CORRIGAN, *Judge.*

APPENDIX C.

JOURNAL ENTRY OF THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of appellant its costs herein expended.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

APPENDIX D.

ORIGINAL ORDER OF THE SUPREME COURT OF OHIO CONFIRMING CONVICTION.

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed.

APPENDIX E.

ORIGINAL OPINION OF THE SUPREME COURT OF OHIO IN SUPPORT OF ENTRY AFFIRMING CONVICTION.

PER CURIAM.

Defendant contends that his constitutional rights have been invaded by permitting the confessions to be introduced in evidence and considered by the jury, and that the prosecutor was in error in not notifying defendant's counsel of the proposed interrogation.

The record discloses that defendant sought the interviews at which the confessions were voluntarily made; that he did not request counsel at the time; and that he was not refused the assistance of counsel.

The judgment of the Court of Appeals is affirmed on authority of *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349.

Judgment affirmed.

TAFT, *C.J.*, and ZIMMERMAN, MATHIAS, HERBERT, SCHNEIDER and BROWN, *JJ.*, concur.

O'NEILL, *Judge* (concurring in the judgment).

I concur in the judgment but not on authority of *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349, in which case I dissented.

The facts in this case differ materially from those in *Escobedo v. State of Illinois* (1964), 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977; *Massiah v. United States* (1964), 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246, and *State v. McLeod, supra.*

I would distinguish this case from those cited above, and I concur in upholding the conviction.

APPENDIX F.

OPINION OF SUPREME COURT OF OHIO ON MOTION FOR RECONSIDERATION.

PER CURIAM. This case is before this court on appellant's motion for rehearing which was treated as a motion for reconsideration and allowed. As appellant states, the affirmance of his conviction was based on the case of *State v. McLeod,* 1 Ohio St. 2d 60, and subsequently the United States Supreme Court reversed the *McLeod* case. 33 L. W. 3375.

The opinion of the Supreme Court of the United States reversing *McLeod* furnishes no guidelines to this court as to what elements in the *McLeod* case caused its reversal. The reversing opinion merely states that the judgment is reversed and cites *Massiah v. United States,* 377 U. S. 201, 12 L. Ed. 2d 246. Speculating as we must, there appear two possible grounds upon which the reversal could have been based even though the confession involved was voluntary. One, that such confession was made after indictment at a time petitioner was not represented by counsel, or, two, that McLeod was not advised

of his right to remain silent and that anything he said could be used against him.

The facts in the instant case bear no resemblance to either *McLeod or Massiah*. The record here shows that both statements made by appellant were given voluntarily in narrative form at interviews instigated by him and at his own request, that these were not interrogatory proceedings, and that at both interviews he was informed that the statements could be used against him. At these interviews the fact that he was represented by counsel was discussed by the prosecuting attorney with appellant and apparently appellant did not want his counsel present. The record shows that such statements were motivated by the desire of appellant to "get even" with one Dick Stewart who caused his apprehension in Alabama.

The trial court, after a full hearing on the question of the suppression of these statements, found that petitioner was not only fully informed of his rights but also that he was well aware of them and intelligently waived them.

Thus, in the present case we have a situation where an accused although represented by counsel voluntarily and at his own request appeared before the prosecuting attorney without his counsel and only after a discussion of the fact that he was represented by counsel and only after he was told that anything he said could be used against him was he allowed to make a voluntary statement.

Our former judgment is adhered to.

FORMER JUDGMENT ADHERED TO.

TAFT, C.J., ZIMMERMAN, MATTHIAS, HERBERT and SCHNEIDER, JJ., concur.

O'NEILL, *J.*, concurring in judgment. The court, in its original opinion in this case (2 Ohio St. 2d 172), relied entirely upon the authority of *State v. McLeod* (1965), in which I dissented, 1 Ohio St. 2d 60, reversed by the Supreme Court of the United States on May 24, 1965, 33 U. S. Law Week 3375.

In its opinion on motion for reconsideration, the court states that the facts in this case "bear no resemblance to either *McLeod or Massiah.*" This being the case, the court should not originally have relied upon *McLeod, supra.*

It requires no speculation on the part of this court to determine the basis for the reversal by the United States Supreme Court of *State v. McLeod, supra.* The defendant in that case was neither granted the right to confer with counsel, nor was he informed of his right to counsel or his right to remain silent. Hence, any statements made by him under those circumstances could not be used against him without prejudice to his constitutional rights. The court, in *McLeod, supra,* unduly limited the application of both *Massiah v. United States* (1964), 377 U. S. 201, 12 L. Ed. 2d 246 and *Escobedo v. Illinois* (1964), 378 U. S. 478, 12 L. Ed. 2d 977.

It is not the duty of defendant to request counsel. It is the duty of the officials attempting to obtain a confession from him to inform him of his rights, and, if he so desires, to give him the opportunity to consult with counsel and to have counsel present at the time he makes a statement.

In both *Massiah, supra,* and *Escobedo, supra,* the rationale appears to be twofold: (1) counsel was not present, (2) because of that fact, or by other means, those in charge of obtaining evidence imposed upon the accused in order to secure incriminating statements against him.

Thus, in *Massiah, supra,* government agents used trickery to obtain statements at a time when the accused was unaware of the circumstances under which he was speaking. In *Escobedo, supra,* the accused was browbeaten by police officers, and was denied the right to consult with his attorney, even after requesting that he be allowed to do so. In *McLeod, supra,* the accused was not informed of his rights.

In the instant case, defendant had an attorney, and had not been denied the right to consult with him at any time. He voluntarily sought out the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. He was informed by the prosecuting attorney, who knew that he was represented by counsel, that he had a right to remain silent, that his statements might be used against him, and that he could expect no consideration for the information he would give. During one of these discussions he indicated that he was dissatisfied with his attorney and might not continue to retain him.

These facts are sufficient to establish that there was no imposition upon the defendant, and that the use of his statements constituted no violation of his rights under the Sixth Amendment to the Constitution as made applicable to the state through the Fourteenth Amendment.

APPENDIX G.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 4, 1965.

s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 791.

JOSEPH ARRINGTON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion. The Ohio Supreme Court affirmed in a per curiam opinion, 2 Ohio St. 2d 172, and upon reconsideration adhered to the former judgment of affirmance, 3 Ohio St. 2d 61.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

The Cleveland Trust Company branch bank at 5703 Broadway, in Cleveland, Ohio, was entered between closing hours on Friday, September 1, 1962 and early Sunday morning, September 3. This was the Labor Day weekend. Entry was gained by forcing the left rear door. A hole had been made in the wall between the washroom and the bank vault. On the second floor of the bank building a window was open and a window in a skylight had been forced open.

The branch bank at 5703 Broadway occupied the ground floor of the two-story building at the corner of Broadway and Portage Ave. The second floor of the building was vacant. Adjoining the bank on the south was a lower two-story building occupied by the Volunteers of America, and next to that and separated by a narrow passageway was a building occupied by a Singer Sewing Machine store. At the sidewalk end of the passageway there was a wrought iron gate.

A beat patrolman of the Cleveland Police Department noticed in the early morning hours of September 2, 1962 that the gate, which had been open when he saw it earlier, was closed. He flashed a light down the passage and saw the silhouette of a man there. He called to the man to halt. The man ran out to the rear, pursued by the officer, who lost sight of the man outside the rear of the passageway. The officer decided to check the buildings and went through the passageway again. There he saw the door leading upstairs was ajar and bore fresh marks. As he was examining the door he heard noises coming from upstairs and went back to Broadway to summon help. He procured the assistance of an accident car which was then on Broadway. More assistance was summoned and other police cars came to the scene. Two patrolmen went up the stairs and

out onto the roof where they saw two men jumping from the roof of the Volunteers over onto an adjoining roof. The fire department was summoned, a ladder placed in front of an adjoining store. When several officers ascended the ladder they found two men on the roof of the store adjoining the Volunteers of America building. They later learned these men were the defendants Arrington and Oponowicz.

A check of Oponowicz' pockets revealed a handful of live .38 ammunition. Lt. Abel, one of the officers on the roof, questioned Arrington. He related his conversation in the following at R. 136, 139:

> "Q. Will you tell us what you said to Joseph Arrington and what he said to you?
>
> A. I said, 'What are you doing up here?'
>
> He said, 'Well, I thought we would get a little money.'
>
> I said, 'You are not going to need any money where you are going.'
>
> He said, 'No, and I guess I won't be driving my new car, either.'
>
> (R. 139) He said, 'I guess I won't be able to drive my new Lincoln.' "

Detectives Breary and Kochanski, upon arriving at the scene, saw other officers with the defendant Polizzi at the rear of the buildings. These detectives went up the stairs, where Detective Breary recognized one of two men being held by police officers as Alfred Oponowicz. Detective Breary talked with Arrington, at first alone and later in the presence of Detective Kochanski. He related what Arrington told him in their first conversation in the following (R. 182-183):

> "I asked him what he was doing on top of this roof, and he said, 'Well,' he said, 'I needed some money, and I went to 105th and Euclid at the Gray

Drugstore and I met Op'—indicating Oponowicz—and he said the other fellow down there, 'and I told them that I need some money, so they took me along. We went some place in Wilbur and we picked up the tools, then we drove to the vicinity of the bank.'

Then he stated that one of the fellows, he didn't state who, gave him a lift and passed the tools on up to him.

When I talked to him, I asked him what did he expect out of this. He said, 'I probably would get half the score.' On hearing this, I called Detective Kochanski and Patrolman Timko over, and he repeated it, but he, on the second time, stated he would get part of the score.

* * *

I noticed he was limping. I asked him how he got the limp. He said he got it jumping from one roof to the other trying to get away from the police, but he said, 'I could have got away any time, I saw the copper go by four or five times.' "

Detective Breary then called Kochanski and another officer over and said to Arrington, "Now, tell them the story that you told me." Detective Kochanski repeated Arrington's answer in the following at R. 274:

"He said that, well, with reference to being on the roof, he was asked of him being with Oponowicz, he said that he met those fellows at the Gray Drugstore at 105th and Euclid, and there was conversation about needing some money, and that then they went over on Wilbur Avenue and they got the tools and brought them and hoist them on the roof. And my partner asked him, 'What was your part. What were you going to get out of it?'

He said, 'Well, I was going to get part of the score.' "

In a well on the Cleveland Trust roof alongside the skylight the officers found a brown leather-type gym bag,

which contained a monitor radio, a pair of tongs with altered jaws, two wood bits, a pair of needle-nose pliers, a pair of goggles, a keyhole saw. The radio worked on the frequency of the Cleveland police call band. A quantity of equipment of the type commonly used in committing burglaries was found on the roof, including a rotary drill equipped to drill through a masonry or concrete wall, steel drills for cutting masonry, cold chisels, a tarpaulin used to hide the bright light when acetylene equipment is used, a wrecking bar, sledge hammers, three oxygen tanks and two acetylene tanks, cutting torch with hoses and gauges, used to cut through metal walls of a safe, pipe wrench, metal pry bar, and other items.

Patrolman William Misch, on Emergency Patrol, was assigned to take Arrington from the city jail to Metropolitan General Hospital on September 4, 1962. Patrolman Misch and his partner, Patrolman Bill Richards, knew Arrington and in talking with him asked him about a Buick that they had seen him driving. Arrington said the Buick wasn't his, it belonged to his girl friend. (R. 350-353.) While waiting in the emergency room at the hospital the officers struck up a conversation with Arrington to pass the time. Officer Misch's account of that conversation appears at R. 353-56. The highlights appear to be as follows:

The officers asked Arrington what he thought he was going to get out of the safe in the bank. Arrington said, roughly, about $800,000. They asked how he managed to get into the building, and he said that neither the National City nor the Cleveland Trust banks has an ADT alarm, all they have is hold-up alarms.

Arrington was then asked what tripped him up then. He answered that they were not getting any calls coming on the walkie-talkie, that he stuck his head out to see what